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International mechanism for the crimes and atrocities in Syria. Possible balances and challenges in international criminal law

DOI:10.5281/zenodo.10684583

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Abstract: The present paper is based on the analysis of the international, impartial and independent mechanism to assist in the investigation and prosecution of persons responsible for the most serious crimes in the Syrian Arab Republic since March 2011. On the one hand we analyze the legal foundations of the institution and on the other the structure and the criticisms accepted for a work that was not so impartial and independent. Political, economic and, juridical reasons were some of the topics that up to now remain open for the work done. The unpunished atrocities, the evidence collected in a particular way but also used not explicitly are issues that make us understand that the mechanism followed by the international criminal court was complex but the goal still remains, i.e. total punishment and non-acceptance by the international community.

Keywords: crimes in Syria; international criminal law; international criminal justice; ICJ; ICC; international law; UN Charter.

Introduction

The international, impartial and independent mechanism to assist in the investigation and prosecution of persons responsible for the most serious crimes in the Syrian Arab Republic[1] was adopted by the General Assembly of the UN through Resolution n. 71/248 of 21 December 2016 based on the proposal of Qatar and Liechtenstein and a group of about 60 states (Stanley, 2016; Amoury Combs, 2017; Nahlawi, 2019; Krapiva, 2019; Scharf, Sterio, Williams, 2020; Sarkin, 2021; Ramsden, 2021)[2].

With the same Resolution, the General Assembly instructed the Secretary General to define, over a period of 20 days, the relative mandate, structure, composition and operating conditions of the body in relation to the final resolution that served for its adoption after 45 days. As early as 19 January 2017, the Secretary gave birth to the terms of reference of the mechanism through the publication of a report entitled: Resolution Establishing the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (Werle, Jessberger, 2020; Governa, Ambos,

[1] https://iiim.un.org/

[2] UN Doc. A/71/L.48 and UN Doc. A/71/L.48/Add.1, 21 December 2016: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/462/01/PDF/N1646201.pdf?OpenElement

Heinze, Rackow, 2021; Ramsden, 2021)[3] with the aim of collaborating and helping the office of the High Commissioner for Human Rights (Nichols, 2016; Naqvi, 2017; Rankin, 2017; Elliott, 2017; Whiting, 2017; Wenaweser, Cockayne, 2017; Owens, 2019; Quirico, 2019; Burgis-Kasthala, 2019; Le Moli, 2020).

Until today[4] this type of particular mechanism continues to exist and represents a definite step against the fight against impunity of the perpetrators of the crimes perpetrated in the civil war in Syria which now dates back to around 2011. The Syrian situation was also the subject of numerous non-governmental organizations[5], as well as referable pursuant to art. 13 of the Statute of the International Criminal Court (StICC) (Werle, Jessberger, 2020) especially after the double Russian and Chinese veto in 2014 (Trahan, 2018)[6]. The goal was to formalize

[3]UN Doc. A/71/755, 19 January 2017: "(…) the Mechanism has an explicit nexus to criminal investigations, prosecutions, proceedings and trials (…) the Mechanism is required to prepare files to assist in the investigation and prosecution of the persons responsible and to establish the connection between crime-based evidence and the persons responsible, directly or indirectly, for such alleged crimes (…) the Mechanism has a quasi-prosecutorial function (…)".

[4]Report A/76/690, 11 February 2022.

[5]www.hrw.org/news/2014/05/15/syria-groups-call-icc-referral

[6]UN Doc. S/2014/348 and UN Doc. S/PV.7180, 22 May 2014. See also in argument the opinion of Jennifer Trahan: [t]he veto power is being abused in a way never anticipated when the Charter was drafted, and in a way that is at odds with other bodies of international law (such as the highest level jus cogens norms) and the "purposes and principles" of the UN Charter, with which the Security Council (including its permanent members) are bound, under article 24.2 of the Charter, to act in accordance (…) Trahan argues that there are three ways in which the Russian veto of the proposal to refer the matter of Syria to the International Criminal Court, or to at least establish an international investigative mechanism for Syria was incompatible with the UN Charter. First, the veto power derives from the UN Charter, which is

a proposal in the UN bodies for the establishment of a special, hybrid, international criminal court competent to try crimes committed during the Syrian conflict. This was an option needed an agreement of the permanent members of the Security Council of the UN and certainly of the Syrian State. The hopes of justice were also responses to the initiatives of national judges as investigations dealing with various types of violence between the parties to the conflict, i.e. rebels, terrorist groups and government forces that taken place in various countries (Kodmani, 2016; Kroker, Kather, 2016; Chivers, 2016; Cumming-Bruce, 2017; Anderson, 2017; Bergsmo, Stahn, 2018; Van Schaack, 2020) following in practice very few cases that had come to pronounce, execute and arrive at final sentences of the conviction (Van Schaack, 2016; Owens, 2019; Rapp, 2021). The limits of the exercise of the jurisdiction of the state courts on international crimes, as well as the cases in which they act based on a criterion of the universality of the criminal

subsidiary to jus cogens norms. Thus, a veto that violates jus cogens norms, or permits the continued violation of jus cogens norms, would be illegal. The Charter (and veto power) must be read in a way that is consistent with jus cogens. Second, the veto power derives from the UN Charter, which states in Article 24(2) that the Security Council "[in] discharging [its] duties (…) shall act in accordance with the Purposes and Principles of the United Nations." A veto in the face of a credible draft resolution aimed at curtailing or alleviating the commission of genocide, crimes against humanity or war crimes does not accord with the Charter's purposes and principles. And finally, a permanent member of the Security Council that utilizes the veto power also has other treaty obligations, such as those under the Genocide Convention, which contains an obligation to "prevent" genocide. A Permanent Member's use of the veto that would enable genocide, or allow its continued commission, would violate that state's legal obligation to "prevent" genocide. A similar argument can be made as to allowing the perpetration of at least certain war crimes, such as "grave breaches" and violations of Common Article 3 of the 1949 Geneva Conventions (…)".

jurisdiction and, the perspective for a general and systematic repression of the crimes committed in Syria were thinkable arguments by the judges as we have seen in practice with the judgment of the Oberlandesgericht Koblenz in Eyad A. case of 20 April 2022[7].

The General Assembly has already stated in the past that by proceeding with the establishment of the Mechanism we can revive the hopes obtaining justice one day for the victims of the conflict in Syria. This statement was seen as a decisive step to ensure accountability[8]. However, it has not failed to raise some perplexities, from the double point of view of opportunity and legality (Van Schaack, 2020)[9]. In general terms, even if this step seems innovative, it is difficult to find a precise location in the increasingly complex and varied paraphernalia of international criminal justice (Simma, Khan, Nolte, Paulus, 2011; Pellet, 2014). The same line of thought was followed by the ICC, arguing in article 22 that the:

"(…) Charter empowers the General Assembly to "establish such subsidiary organs as it deems necessary for the performance of its functions (…) the General Assembly has the authority to establish a "subsidiary organ" to collect and assess the available evidence of international crimes in Syria in order to inform the General Assembly's discussion and recommendations on these matters (…). The evidence collected by the IIIM would undeniably not

[7] 1StE3_21-Judgment_Unofficial-IIIM-Translation_EN.pdf

[8] UN Doc. A/71/PV.66, 21 December 2016, p. 19. See also IIIM Syria: Strategic plan: https://iiim.un.org/wp-content/uploads/2023/02/IIIM-Strategic-Plan-2023-2025.pdf

[9] Resolution 71/248 (UN Doc. A/71/PV.66, op. cit.); UN Doc. A/71/859, 4 April 2017; UN Doc. A/71/817, 1st March 2017; UN Doc. A/71/793, 14 February 2017; UN Doc. A/71/799, 20 February 2017 and UN Doc. A/71/825, 3 March 2017.

be used solely (or even primarily) for the purpose of the General Assembly's discussion and recommendations, but it is not clear that additional uses of the information would render the creation of the IIIM beyond the power of the General Assembly (...)" (Ramsden, 2017).

It is significant that the performance of the functions was problematic above all for its own structural creation. The establishment of the mechanism by the General Assembly was still in progress given the lack of relative consensus and the continued opposition of Syria which also stated during the adoption of the resolution "its commitment to the sovereignty of the Syrian Arab Republic". International practice up to now has shown us that in cases where a conflict was evolving, the opposition of the territorial state as well as the initiative to take measures to ensure the punishment of individual international crimes was a topic for the Security Council according to its competences for the maintenance of international peace and security, pursuant to Chapter VII of the UN Charter (Kolb, 2018)[10].

Mandate and structure of the mechanism

The mechanism has found a home in Geneva and was organized by a judge and a prosecutor with broad experience in the field of investigations and international criminal justice and with

[10]Resolution 827 (1993) of 25 May 1993 and 955 (1994) of 8 November 1994; Resolution 1593 (2005) of 31 March 2005 and 1970 (2011) of 26 February 2011. ICTY, Prosecutor v. Tadić, Case No. IT-94-1-T (Trial Chamber, Decision on the Defense Motion: Jurisdiction of the Tribunal, 10 August 1995), affirmed, Prosecutor v. Tadić, Case No. IT-94-1-AR72 (Appeals Chamber, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995).

expertise in the areas of international humanitarian law, criminal law and human rights protection. The mandate was after appointment of the Secretary General for a renewable period of 2 years and with a guarantee of independence and impartiality ensuring the staff involved a fair representation of different legal traditions and the related gender balance[11].

In particular, the mechanism will deal with:

"(...) a) collect, classify, corroborate and analyze evidence of violations of international humanitarian law and human rights in Syria; and b) prepare files with a view to the initiation of criminal proceedings, in accordance with international law standards, before national, regional or international tribunals which already have now or may in the future have jurisdiction over international crimes perpetrated in the course of the conflict (...)"[12].

The objective was of a conservative nature, preparatory to ensure the prosecution of crimes committed in Syria by preventing the related evidence of collection by the mechanism, from states, regional and international organizations, United Nations bodies, non-governmental organizations and individuals, who:

"(...) may be destroyed or become unusable; on the other hand, lay the foundations for the punishment of those responsible, facilitating, in terms of reducing the costs and times of the necessary investigations, the exercise of the criminal action on the basis of the probative material acquired, if and when the conditions are created for the celebration of trials (...) it will not exercise judging functions (...) its activities being rather conceived as preparatory to the future and possible exercise (...) establishing, internal criminal courts, of criminal action (...) therefore does not arise as an alternative measure compared to the options indicated, but it can rather be configured as a complementary tool with respect to them (...)".

[11]UN Doc. SG/A/1744-BIO/4979-DC/3720, 3 July 2017.

[12]UN Doc. A/71/L.48, op., cit., par. 4 and the par. 3 of the terms of reference, UN Doc. A/71/755, cit.

The mechanism's dealings with the Commission of Inquiry on Syria which was formed and established in 2011 through the Human Rights Council[13] included the report of the Secretary-General, which:

"(...) merely underlines the complementarity and differences of the respective mandates; while the collection by the Commission of Inquiry of information relating to the abuses committed during the conflict is functional to the elaboration of reports and recommendations addressed to the states, the files prepared by the Mechanism, thanks also to the material placed at its disposal by Commission, will not be made public, this evidently in order to ensure the secrecy of the investigative measures (...)"[14].

Of course we cannot speak for an easy and smooth work between the two bodies given that the precise definition of their methods of interaction and collaboration due to the participation of various states perhaps endangered the activity of the mechanism which could end up with the relative overlapping of the Commission[15].

Impartiality of the mechanism or one-way criminal justice?

The Resolution which adopted and created the mechanism relating to the crimes committed in the parties to the conflict, as well as the explanatory terms of reference[16] represent a type of mechanism in theory and in practice that is rather impartial not because is based on the initiative of the General Assembly but perhaps because the work done had to be based on the field of

[13]UN Doc. A/HRC/RES/S-17/1, 23 August 2011.
[14]Par. 30 of the terms of reference, UN Doc. A/71/755, op. cit.
[15]UN Doc. A/71/PV.66, op. cit., pp. 32, 34 and 35.
[16]Par. 5, lett. a), of the terms of reference, UN Doc. A/71/755, op. cit.

human rights, speaking for a transitional justice at the international level and at the same time an effective capacity for the maintenance of a real autonomy that respects the political interests involved in the war in Syria, as well as a neutral body between various parties which are in conflict. But in conflict period is it possible for an international body to be impartial and just? The practice up to now has shown us no. The mass media, public opinion, the interests of neighboring states, the opinion of the international organization are topics of concentration that lead to various criticisms of greater interest not only in the initial phase but also in the willingness of the General Assembly to perhaps modify the own initial choices[17]; and above all the relative financing which is based on voluntary contributions as a system which inter alia exposes the relative functioning of the possibility of interference and conditioning by the states which were part of this mechanism[18].

Another topic concerned the arbitration sector of par. 14 (i.e. terms of reference) regarding the mechanism that could refuse to provide assistance in support of the courts and the activities considering international human rights standards and the right to a fair trial indispensable. The lack of a precise definition of the

[17]UN Doc. A/71/L.48, op. cit., par. 8.

[18]UN Doc. A/71/PV.66, op. cit., pp. 22, 25, 26, 30, 31, 35. UN Doc. A/71/825, op. cit., p. 2. See also: A Memorandum to the Secretary General of the United Nations Regarding the New United Nations Mechanism for Investigation and Prosecution, 19 January 2017, www.syriaaccountability.org/2017/01

methods of verification was a prediction that could lead to exploitation and to abuses of all kinds[19]. This perspective had to do with the method, timing and presentation of the proposal based on the initiative and own elaboration. Thus the Syrian government could be ousted and overshadow the suspicions and real intentions of the promoters. Both Syria[20] and the other states[21] that were involved in the conflict did not demonstrate impartiality and independence but above all those states that were linked with the terrorist groups operating on Syrian territory (Wintour, 2017).

Such statements had the consequence of raising general questions that are connected with the re-establishment and maintenance of the international peace and the international criminal law (Werle, Jessberger, 2020). It is also noted in theory that the imposition on the warring parties of instruments of repression of international crimes committed during a conflict could complicate and slow down the peace reconstruction process. The mediation activity carried out by the United Nations has so far produced largely disappointing results[22]. It should be noted that in the framework of the Geneva Peace Conference the question of transitional justice had been framed as one of the dossiers to be addressed in the more general

[19]UN Doc. A/71/793, op. cit., p. 2 and UN Doc. A/71/799, op. cit., p. 2.

[20]UN Doc. A/71/799, op. cit., p. 4.

[21]UN Doc. A/71/PV.66, op. cit., pp. 33, 35.

[22]Final comunication of 30 June 2012, UN Doc. A/66/865-S/2012/522, Annex, par. 11, lett. d).

context of the political solution to the conflict. Thus there is the risk that the possible perception of the Mechanism as a "one-way" instrument of criminal justice could produce a deleterious effect on the negotiation, further stiffening the availability of the government of Bashar al-Assad (Stanley, 2016; Amoury Combs, 2017; Krapiva, 2019) to deal with opposition movements[23]. So even today the topic is indefinable, inconclusive and certainly enclosed by political and economic interests that do not allow it to be part of a clearly juridical international discussion.

What "typical" model does the commission of inquiry use?

As we understood from the previous paragraphs, the objective of the mechanism from the beginning was the criminalization of international crimes, therefore the Commission of inquiry had the task of establishing the facts based on the model designed by the Convention of the Hague of 1899 on the peaceful settlement of disputes according to the "de facto law-applying authorities" (Van Den Herik, 2014), focused on the assessment of international human rights law and the related profiles of international criminal law. In the commissions of experts established in the Security Council and the criminal tribunals for the repression of international crimes took part the Commission of experts with impartially to investigate related crimes, and

[23]UN Doc. A/71/PV.66, op. cit., pp. 21-22, 23, 25, 28, 33, 34. Verbal note: UN Doc. A/71/799, cit., pp. 3-4.

violations of international law as we have seen in the past in the former Yugoslavia through Resolution 780 (1992) of 6 October 1992, Rwanda with Resolution 935 (1994) of 1 July 1994; Darfur with resolution 1564 (2004) of 18 September 2004 and the International Commission of Inquiry to assist the Lebanese government in the investigation of the terrorist attack on former Prime Minister Rafiq Fariri, established on the basis of Resolution 1595 (2005) of 7 April 2005 (Van Den Herik, 2014; Werle, Jessberger, 2020).

Commissions of inquiry were instruments of particular importance. They took part on the Human Rights Council of the UN for the promotion of the implementation of human rights obligations undertaken by states (Henderson, 2017)[24]. These Commissions aimed to investigate human rights violations that are committed in specific crisis areas, as well as to evolve international criminal law as a tool that will punish inhuman atrocities of an international nature (Henderson, 2017; Harwood, 2020)[25]. In this specific case, the mandate for Syria targeted the crimes perpetrated during the conflict[26]. The Commission itself has already tried to enhance the profiles of a penal nature by expressing its reports in favor of the Syrian situation to the

[24]Resolution n. 60/251 of 15 March 2006, par. 5, lett. d). UN Doc. A/RES/60/251, 15 March 2006.

[25]Harwood, (2015). Human rights in fancy dress? The use of international criminal law by human rights Council Commissions of inquiry in pursuit of accountability. Japanese Yearbook of International Law, 74ss.

[26]UN Doc. A/HRC/RES/S-17/1, op. cit., par. 13.

International Criminal Court (ICC) (Pues, 2022)[27]. Already due to the lack of some precise indications regarding the mandate entrusted, the commissions expressed autonomous assessments where they applied the principles and rules of international criminal law. This type of criminal law dimension as mission activity was also a tool that distinguished the past and above all the traditional investigations from all the international community trying to follow dynamic new policies that led out of the blockade expectation of the Security Council. Overall, the Commission would represent public opinion and have the de facto aim to express condemnation, i.e. to present a compelling conflict narrative so as to counter the Security Council inaction or to elicit alternative involvement by the International Criminal Court (Pues, 2022).

The mechanism for Syria marked an evolutionary phase of the mandates of the Commissions of inquiry, creating a still innovative and different model. On the one hand, the performance of an activity attributable to the judging function appears strictly functional to a type of Prosecutor without a tribunal. This type of mechanism based on real evidence was not limited to a mere acquired material, organized for the function of probative necessities typical of the criminal trial but also for

[27]Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, A/HRC/33/55, 11 August 2016, par. 147, lett. c). See also the relevant Report of the General Assembly of 11 February 2022: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/256/36/PDF/N2225636.pdf?OpenElement

the attribution of the reassuring competence to establish the connection between crime-based evidence and the persons responsible, directly and indirectly, for such alleged crimes, focusing in particular on linkage evidence[28].

The mechanism was based on precise elements of evidence where the mens rea and the forms of panel responsibility include the responsibility of the responsible superior as well as a systematic organization of the material in possession, thus identifying the integrative probative gaps that had to do with the additional documentation. The conservation of evidence was aimed at maximizing the relative possibilities of use also on future criminal proceedings. The crimes that occur in practice was by now a typical reality of an almost prosecutorial nature as the Secretary General himself already identified and referred to in his report[29]. Already the presence in the structure of a unit for the protection of victims and witnesses constituted a further step similar to that of the work carried out in criminal courts[30].

Equally important was the Resolution 2379 for Syria that was adopted on 21 September 2017 by the Security Council, as a body related to the service of international criminal justice finding application to serious and systemic violations of human rights, violation of international humanitarian law and international crimes (Kaufman, 2017). The Security Council has

[28]Par. 6 of terms of reference, UN Doc. A/71/755, op. cit.
[29]UN Doc, A/71/755, op. cit., par. 32.
[30]Par. 20 of the terms of reference, UN Doc. A/71/755, op. cit.

invested the Secretary General:

"(...) to form an Investigative Team, impartial, independent, and credible[31], charged with collecting and preserving evidence of the atrocities being committed by ISIS in Iraq in order to ensure the broadest possible use before national courts, and complementing investigations being carried out by the Iraqi authorities, or investigations carried out by authorities in third countries at their request (…)" (Cooper, Schear, 2014; Cooper, Landler, Rubin, 2014).

This is a broad mandate that brought the mechanism into contact with the General Assembly regarding the situation in Syria (Gurmendi Dunkelberg, Ingber, Pillai, Pothelet, 2018).

Art. 12 of the UN Charter and its relationship with the mechanism

The General Assembly did not bring us a relevant provision that had to do with the UN Charter as the legal basis of the relevant initiative. The terms of reference of the Secretary General defined the subsidiary body of the Assembly which referred to art. 22 of the UN Charter (Pellet, 2014). Thus the General Assembly was allowed to create bodies that are called to exercise powers attributed by the UN Charter and in implicit way (Pellet, 2014). The International Court of Justice (ICJ) has already taken a position in the distant opinion of 13 July 1954 on the effects of the judgments of the administrative tribunal of the UN recognizing the competence of the General Assembly to create a Tribunal for labor disputes between the Organization and the own officials, enhancing the relative functional link of

[31]UN Doc. S/RES/2379 (2017), 21 September 2017, par. 6.

the measuring power and assigned to the Assembly according to art. 101 of the UN Charter the conditions of employment of officials of the organization[32].

But is there a determining and sufficient relationship between the mechanism and the powers of the Assembly? We can speak of a delicate aspect given that the mechanism carries out functional activities related to the exercise of criminal prosecution by competent courts. These activities are also provided for by international law and are not assimilated to a traditional commission of inquiry which has as its final objective only the finding of the facts. It is clear that the General Assembly has now unlimited powers of inquiry and the latter must be preparatory to the conciliatory function. These powers become illegitimate if preordained for the purpose of exercising functions that the Assembly does not have. They are also reflected in the Declaration concerning the fact-finding activities carried out by the United Nations for the purpose of maintaining international peace and security, annexed to the Resolution 46/59 of the General Assembly, of 9 December 1991 pursuant to art. 10 of the UN Charter. The General Assembly has very broad powers of discussion and recommendation, as they are capable of covering any matter falling within the sphere of interest of the Organization. In addition, it may deal with issues relating to

[32]ICJ, Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion of 13 July 1954, in ICJ, Reports 1954, p. 47, 56-58.

international criminal justice. Indeed, it has demonstrated a certain activism in this field in recent years (Ramsden & Hamilton, 2017; Scharf, 2023).

The Security Council, given the absence of consensus from Syria, had doubts but also issues respectively at the limits of the action of the General Assembly according to articles 11 and 12 of the UN Charter. The General Assembly is the body that can adopt recommendations regarding disputes or situations that respect the Security Council by exercising the functions according to its Statute. Of course, there are many political differences within the Council especially from the fixed members who prevent the application of particular and incisive measures in relation to the Syrian question starting in 2011[33]. However, the ICJ with regard to art. 12 (Pellet, 2014), para. 1 spoke to us for a fairly flexible application by placing the president of the General Assembly himself on the draft of Resolution 71/248 and the Office of the Legal Adviser:

"(...) on the basis of which art. 12 would require, for the purposes of its application, a simultaneous interest (at this moment) by the Security Council regarding the same issue (...)"[34].

The General Assembly has also previously addressed the situation in Syria. Before the adoption of the aforementioned resolution, it adopted Resolution no. 71/130 in 9 December

[33]UN Doc. A/71/PV.66, op. cit., pp. 21, 28, 29 and 26. UN Doc. A/71/799, cit., pp. 1-2.

[34]UN Doc. A/71/PV.66, op. cit., p. 28.

2016[35] concerning the invitation of the Security Council to take additional measures due to the devastating humanitarian crisis that was created by the siege of Aleppo and the violation of human rights, as well as the question of the crimes committed, by whom must be punished.

Coercive mechanism. The relationship with the Investigative Team and the crimes committed by ISIS in Iraq

The Resolution no. 71/248 did not take into consideration art. 11, par. 2 of the UN Charter (Pellet, 2014) which defines the relative limit of the competences of the General Assembly in connection with the work of the Security Council. Thus the General Assembly cannot take actions, an expression which, in the jurisprudence of the ICJ is understood as coercive measures (Rosenne, 1992; White, 2015)[36]. Coercive measures that entered into Chapter VII of the UN Charter, i.e. an organizational part of the Security Council (Pellet, 2014) and qualified with the related initiatives of the UN in the field of international criminal justice and against crimes connected by states that are involved. The intervention of the Security Council creates a mandatory model regarding the exercise of criminal jurisdiction and at the same

[35]Resolution 71/130 (Syria) A/RES/71/130 of 9 December 2016.

[36]ICJ, Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, in ICJ. Reports 1962, p. 151, 164-165. According to Rosenne: "(…) provided a firm legal basis for activities (...) which although not specifically mentioned in the Charter nevertheless come within the scope of the purpose of the United Nations as set out in art. 1 of the Charter (...)".

time susceptible to the will of the states that are concerned. In this sense, according to the Resolution 71/248 the General Assembly has to do the work of the Security Council[37]. Thus the General Assembly has contributed to the bodies operating in the field of criminal justice. We have seen this legal model in the Cambodian extraordinary chambers. In the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, concluded on 17 March 2003 and approved by the same Assembly with Resolution 57/228B on 22 May 2003. Similarly, an International Commission was established on the basis of an agreement signed between the United Nations and Guatemala on 12 December 2006 with formal approval also by the Assembly[38] for Impunity in Guatemala. Due to the functions performed, it probably has greater elements of affinity with the Mechanism (Hudson, Taylor, 2010; Zamadio Gonzàlez, 2019).

The rigorous impasse of the Security Council was a topic never exhausted, especially in the face of situations that characterize the systematic and very serious violations of human rights, of international humanitarian law, as well as the Resolution 377 (V) of the General Assembly of 3 November 1950 (so-called Uniting for Peace) (Udoh, 2015; Nanda, 2020), which

[37]UN Doc. A/71/PV.66, op. cit., p. 26. UN Doc. A/71/799, op. cit., p. 2.
[38]UN Doc. A/RES/63/19, 16 December 2008.

constituted a legal basis relating to the assumption of the General Assembly for the coercive measures that favor the repression of international crimes (Scharf, 2023)[39].

Of course it is a goal that evolves over time given that the mechanism has not decided the course of the special session which was envisaged by the relative resolution. We recall in particular the investigative team in the case of Iraq which was created by the Security Council with the aim of eliminating:

"(...) a global threat to international peace and security constituted by ISIS (...)[40].

In a state where crimes that are the subject of the mandate have occurred in its territory and where the body was involved in the creation of the mandate from the outset[41]. Iraq was among the promoters of the initiative according to Resolution 2379 of 9 August 2017 which invited the Secretary General of the UN and

[39]UNGA Res. 377 A(V), 3 November 1950. Human Rights Council, Report of the United Nations Fact-Finding Mission on the Gaza Conflict, UN Doc. A/HRC/12/48, 25 September 2009, par. 1971, lett. a) ("(…) the General Assembly may consider whether additional action within its powers is required in the interests of justice, including under its resolution 377 (V) on Uniting for peace). Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea, UN Doc. A/HRC/25/CRP.1, 7 February 2014, par. 1201 ("(…) the event that the Security Council fails to refer the situation to the ICC or set up an ad hoc tribunal, the General Assembly could establish a tribunal. In this regard, the General Assembly could rely on its residual powers recognized inter alia in the "Uniting for Peace" resolution and the combined sovereign powers of all individual Member States to try perpetrators of crimes against humanity on the basis of the principle of universal jurisdiction (...)").

[40]UN Doc. S/RES/2379 (2017), op. cit., preamble.

[41]S/RES/2379 (2017) of 21 September 2017: "(…) today's resolution, which provides for the creation of a team to collect, pre- serve and store evidence of crimes committed by ISIL terrorists in Iraq, was discussed in detail with the country's authorities, and we commend that approach. Regrettably, that has not always been the case, as when, for example, the initiators of an illegitimate General Assembly resolution on a similar structure in Syria did not even consider the necessity of consulting Damascus (...)" (UN Doc. S/PV.8052, 21 September 2017, p. 6).

the Security Council:

"(…) to ask the international community to provide assistance (…) in (its) effort to continue the terrorist entity ISIL (...)"[42].

The same resolution already clarified that the terms of reference of the new body must be acceptable to the government of Iraq[43]. Judges and experts of Iraqi nationality will be part of the team to work on an equal footing alongside international experts. The Investigative will have to operate in full respect of the sovereignty of Iraq and its jurisdiction over the crimes committed on its territory. The Iraqi authorities will constitute the primary intended recipient of the activity of the same and the sharing of the data collected with other subjects had to be decided in agreement with the government of Iraq on a case by case basis (Langer, Eason, 2019).

Thus, the mandate of a new body targeted only the crimes committed by ISIS and not those perpetrated by other groups, including also the Iraqi government forces, the numerous NGOs that collected the relevant evidence instead of the investigation, as well as the abuses committed between the parties to the conflict. Any reference to the use of this evidence collected and cataloged by the Investigative team by the ICC has disappeared given that its jurisdiction, as also happens in the case of Syria,

[42]Letter dated 14 August 2017 from the Chargé d'affaires a.i. of the Permanent Mission of Iraq to the United Nations addressed to the President of the Security Council, UN Doc. S/2017/710, 16 August 2017, affirmed that: "(…) Iraq must maintain its national sov- ereignty and retain jurisdiction, and its laws must be respected, both when negotiating and implementing the resolution (...)".

[43]UN Doc. S/RES/2379 (2017), op. cit., parr. 4 and 7.

has not been accepted by the territorial state.

Concluding remarks

The effectiveness of the same mechanism, regardless of whether the General Assembly has coercive powers or not, remains in question not so much from an organizational point of view but rather due to the work carried out and the final results it has brought. The mechanism is certainly part of a system that has to do with international organization and cooperation but without performance obligations[44]. The activation of the organ during the time has seen in practice, as always happens, that the operation is much more complicated than the expected imagination running into interpretative difficulties with the declarations of enthusiasm of the states that participated with the Resolution 71/248 in relation to the functioning of the organ (Pues, 2022)[45]. The mechanism continues up to today, with various criticisms above all for the repression of the crimina iuris gentium and with the continuous risk of failure, as a weak system of an international criminal justice that continues to be behind the political needs and interests of the states and not a pure, concrete work of offering towards the victims as part of the perspective of an international justice.

[44]UN Doc. A/71/L.48, op. cit., par. 6.
[45]UN A/RES/71/248 of 21 December 2016.

The punishment of crimes is a difficult subject as we have also noted in the case of Syria and above all in the impossibility of any commission to play a credible, serious role in supporting the international community and in criticizing the permanent members of the Security Council. The mechanism has many times encountered problems recalling for example the Russian veto of the Security Council which blocked the related mandate of the joint investigative mechanism of the UN as well as of the organization for the prohibition of chemical weapons[46] by establishing the Resolution 2235 (2015) of 7 August 2015 of the Security Council (Butchard, 2020)[47]. Done or not, the mechanism has constituted a mirror before public opinion that the situation in Syria is not the only case in the world and that the repression of international crimes is not only a political and economic issue but also a legal one. The practice is difficult, but the Commission's project alone is not enough to play an important role in the history of the punishment of atrocities and

[46]Provisional Verbatim Record of the Security Council, Threats to International Peace and Security: The Situation in the Middle East, UN Doc. S/PV.8233, April 14, 2018: "(…) in lock step: we were in complete agreement (…) the United States can be held to have implicitly adopted the rationale of the United Kingdom. This is particularly significant because the United States has never before recognized a right of humanitarian intervention outside of Security Council authorization under international law (…)". See also: International Law Commission, Draft Articles on State Responsibility, Art. 11 (2008): http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (citing international cases where a state's unequivocal acknowledgment and adoption of another's position will render the state retroactively responsible for it (...)).

[47]UN Doc. S/2017/884: UN Doc. S/PV.8073, 24 October 2017, p. 5 ss.

international criminal law.

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